

**IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF ALABAMA**

WILLIE MCNAIR,	)	
	)	
Plaintiff/Counter-Defendant,	)	
	)	
v.	)	Case No. 2:06-cv-695-WKW
	)	
RICHARD ALLEN, et al.,	)	
	)	
Defendants/Counter-Plaintiffs.	)	
<hr/>		
JAMES CALLAHAN,	)	
	)	
Plaintiff/Counter-Defendant,	)	
	)	
v.	)	Case No. 2:06-cv-919-WKW
	)	
RICHARD ALLEN, et al.,	)	
	)	
Defendants/Counter-Plaintiffs.	)	

**PLAINTIFF CALLAHAN'S MOTION FOR LEAVE TO FILE SUPPLEMENTAL  
MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR STAY OF EXECUTION**

Plaintiff JAMES HARVEY CALLAHAN moves this Court for leave to file a supplemental memorandum of law in support of his Motion for Stay of Execution dated November 19, 2007 (Doc. 147). A copy of such supplemental memorandum is attached hereto as Exhibit A.

On December 5, 2007, the United States Supreme Court stayed Alabama's execution of Tommy Arthur, pending the disposition of his petition for a writ of certiorari to the Eleventh Circuit Court of Appeals decision affirming, on grounds of laches, the dismissal of his action under 42 U.S.C. § 1983 challenging Alabama's method of execution by lethal injection. *Arthur v. Allen*, No. 07-0342-WS-C, 2007 WL 2320069 (S.D. Ala. Aug. 10, 2007), *aff'd* No. 07-13929, 2007 WL 2709942 (11th Cir. Sept. 17, 2007), *stay granted pending disposition of petition for*

*writ of certiorari* \_\_\_ S. Ct. \_\_\_, No. 07395, 2007 WL 4248619 (Dec. 5, 2007). The Supreme Court's issuance of a stay to Tommy Arthur is pertinent to Plaintiff Callahan's motion for a stay of execution because it affirms the Supreme Court's pattern of staying executions since it granted certiorari in *Baze v. Rees*, 128 S. Ct. 34 (2007). Plaintiff seeks leave to file a supplemental brief bringing the Supreme Court's order in *Arthur* to the Court's attention.

For the foregoing reasons, Plaintiff respectfully requests that the Court grant him leave to file the attached supplemental memorandum.

Date: December 7, 2007

/s/ Vincent R. FitzPatrick, Jr.  
VINCENT R. FITZPATRICK, JR.  
HEATHER K. MCDEVITT  
STEPHANIE COHEN  
Bar Numbers (SDNY): VF2907; HM9973; SM7006

White & Case LLP  
1155 Avenue of the Americas  
New York, NY 10036  
Telephone: (212) 819-8200  
Facsimile: (212) 354-8113  
vfitzpatrick@whitecase.com  
hmcdevitt@whitecase.com  
stephcohen@whitecase.com

CERTIFICATE OF SERVICE

I certify that on December 7, 2007, a copy of the foregoing was filed electronically with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following: J. Clayton Crenshaw, James W. Davis, Jasper B. Roberts and Corey L. Maze.

/s/ Stephanie Cohen  
STEPHANIE COHEN  
Bar Number (SDNY): SM7006

White & Case LLP  
1155 Avenue of the Americas  
New York, NY 10036  
Telephone: (212) 819-8200  
Facsimile: (212) 354-8113  
stephcohen@whitecase.com

*Counsel for Plaintiffs*

# **EXHIBIT A**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF ALABAMA**

WILLIE MCNAIR,	)	
	)	
Plaintiff/Counter-Defendant,	)	
	)	
v.	)	Case No. 2:06-cv-695-WKW
	)	
RICHARD ALLEN, et al.,	)	
	)	
Defendants/Counter-Plaintiffs.	)	
<hr/>		
JAMES CALLAHAN,	)	
	)	
Plaintiff/Counter-Defendant,	)	
	)	
v.	)	Case No. 2:06-cv-919-WKW
	)	
RICHARD ALLEN, et al.,	)	
	)	
Defendants/Counter-Plaintiffs.	)	

**PLAINTIFF CALLAHAN'S SUPPLEMENTAL MEMORANDUM OF LAW  
IN SUPPORT OF HIS MOTION FOR STAY OF EXECUTION**

In further support of his Motion for Stay of Execution (Doc. 147), Plaintiff JAMES HARVEY CALLAHAN submits the following:

On December 5, 2007, the United States Supreme Court stayed Alabama's execution of Tommy Arthur, pending the disposition of his petition for a writ of certiorari to the Eleventh Circuit Court of Appeals decision affirming, on grounds of laches, the dismissal of his action under 42 U.S.C. § 1983 challenging Alabama's method of execution by lethal injection. *Arthur v. Allen*, No. 07-0342-WS-C, 2007 WL 2320069 (S.D. Ala. Aug. 10, 2007), *aff'd* No. 07-13929, 2007 WL 2709942 (11th Cir. Sept. 17, 2007), *stay granted pending disposition of petition for writ of certiorari* \_\_\_ S. Ct. \_\_\_, No. 07395, 2007 WL 4248619 (Dec. 5, 2007). The Supreme Court granted Arthur a stay of execution even though the Eleventh Circuit held that Arthur had

unreasonably delayed in filing his action by waiting nine months after the Eleventh Circuit denied relief in his federal habeas action. *Arthur*, 2007 WL 2709942, at \*4.

Arthur's stay of execution is the latest reprieve granted by the Supreme Court since granting certiorari in *Baze v. Rees*, 128 S. Ct. 34 (2007). As this Court is aware, *Baze* concerns a challenge to Kentucky's lethal injection protocol, which uses the same three-drug cocktail for lethal injection as Alabama. The Supreme Court's order in *Arthur* affirms a post-*Baze* practice of granting stays of execution by lethal injection. In every lethal injection case that has come before it post-*Baze*, except one where the execution was scheduled for the same day that *Baze* was issued, the Court has either granted, or refused to vacate, a stay of execution. See Motion for Stay of Execution, Doc. 147 at 2. Since *Baze*, there have been no executions by lethal injection in the United States.

The Supreme Court's message to lower courts is unambiguous: executions should be postponed until *Baze* is resolved. Indeed, now that the Court has stayed the execution of an Alabama inmate challenging the same Execution Procedures as Mr. Callahan, there can be no lingering doubt that Mr. Callahan's execution should be stayed until *Baze* is decided and subsequent proceedings, guided by the decision in *Baze*, are completed.

For the foregoing reasons and the reasons detailed in Mr. Callahan's Motion for Stay of Execution, plaintiff respectfully requests that this Court grant (i) injunctive relief and stay Mr. Callahan's execution, and (ii) such further other relief as the Court deems warranted. If for any reason a stay is denied, Mr. Callahan requests an expedited evidentiary hearing, though he

contends that such a procedure would deprive him of due process under the circumstances.

Date: December 7, 2007

/s/ Vincent R. FitzPatrick, Jr.  
VINCENT R. FITZPATRICK, JR.  
HEATHER K. MCDEVITT  
STEPHANIE COHEN  
Bar Numbers (SDNY): VF2907; HM9973; SM7006

White & Case LLP  
1155 Avenue of the Americas  
New York, NY 10036  
Telephone: (212) 819-8200  
Facsimile: (212) 354-8113  
vfitzpatrick@whitecase.com  
hmcdevitt@whitecase.com  
stephcohen@whitecase.com

CERTIFICATE OF SERVICE

I certify that on December 7, 2007, a copy of the foregoing was filed electronically with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following: J. Clayton Crenshaw, James W. Davis, Jasper B. Roberts and Corey L. Maze.

/s/ Stephanie Cohen  
STEPHANIE COHEN  
Bar Number (SDNY): SM7006

White & Case LLP  
1155 Avenue of the Americas  
New York, NY 10036  
Telephone: (212) 819-8200  
Facsimile: (212) 354-8113  
stephcohen@whitecase.com

*Counsel for Plaintiffs*